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Supreme Court, U.S.
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No. 01-6978

IN THE

Supreme Court of the United States

GARY ALBERT EWING,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal for the State of California Second Appellate District

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does petitioner's enhanced sentence for shoplifting three golf clubs—life imprisonment without possibility of parole for at least twenty-five years—violate the Eighth Amendment's prohibition against cruel and unusual punishments?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The California Supreme Court's summary denial of Mr. Ewing's Petition for Review was entered on July 11, 2001, is unreported, and is reprinted in the Appendix to the Petition for Certiorari. *See* Pet. App. 2. The opinion of the California Court of Appeal, Second Appellate District, Division Six, was entered on April 25, 2001, is unreported, and is reprinted in the Appendix to the Petition for Certiorari. *See* Pet. App. 1. The sentencing decision of the California Superior Court was rendered on August 3, 2000, was made orally in court, was transcribed at Reporter's Transcript 1501 through 1512, and is reprinted in the Joint Appendix. *See* JA 7-16.

STATEMENT OF JURISDICTION

The California Supreme Court denied Mr. Ewing's Petition for Review on July 11, 2001. Mr. Ewing timely filed a petition for writ of certiorari on October 3, 2001. The petition was granted on April 1, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, California Penal Code sections 17(b), 18, 487(a), 654, 667(b) through (i), and 1170.12 (a) through (d), and California Rules of Court 420-423 (West 1999) (renumbered 2001) are reproduced in Appendix 1.

STATEMENT OF THE CASE

This case concerns the constitutionality of a life sentence without possibility of parole for twenty-five years, imposed under California's "Three Strikes, and You're Out" law, for the offense of shoplifting three golf clubs.

A. Facts of the offense

On the morning of March 12, 2000, Petitioner Gary Ewing entered a golf pro shop in Los Angeles County, California. He asked the man who worked there several questions, and then looked around the shop for about ten to fifteen minutes. RT 352. He again approached the employee and purchased a token redeemable for golf balls on the driving range. RT 353. He once more looked around the pro shop, this time in the area where golf clubs were displayed. He returned a third time to the employee, asking him where the driving range was. The employee directed him to an exit on one side of the pro shop. Instead of exiting through that door, however, Mr. Ewing left the shop through a door in the opposite direction,

which led to the parking lot. RT 355. The employee observed that Mr. Ewing was walking with a noticeable limp, which he had not seen during their two earlier encounters. The employee called 911. RT 355-356. When the police arrived, they discovered Mr. Ewing between two parked cars pulling three golf clubs from his pants leg. RT 387. The police told him to put down the clubs, each of which retailed for $399. Mr. Ewing complied and was taken into custody without incident. RT 387-388.

B. Procedural History

Mr. Ewing was charged by Information with, and ultimately convicted of, one count of grand theft of personal property in violation of California Penal Code section 487(a) (value of property in excess of $400).[1] CT 25-27. Grand theft is one of a group of offenses in California known as "wobblers." *See* Cal. Penal Code § 489 (West 1999); *People v. Douglas*, 79 Cal.App.4th 810, 813 (2000). A wobbler is an offense that may be punished in the discretion of the prosecutor or the court alternately as a misdemeanor with a sentence to imprisonment in a county jail for not more than one year,[2] or as a felony with a sentence to state prison. *See* Cal. Penal Code § 17(b) (West 1999); *People v. Superior*

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[1] The Information also charged Mr. Ewing with one count of burglary in violation of California Penal Code section 459, but the jury found him not guilty of that offense. CT 80-81.

[2] If a wobbler is sentenced as a misdemeanor, it is thereafter considered a misdemeanor for all purposes. Cal. Penal Code § 17(b); *but see People v. Franklin*, 57 Cal.App.4th 68, 73 (1997) (a wobbler where defendant is committed to the California Youth Authority and upon discharge the offense is reduced to a misdemeanor under § 17(c) qualifies as a strike under the Three Strikes law).

Court (Alvarez), 14 Cal.4th 968, 974 (1997). The felony sentence for grand theft is imprisonment for sixteen months, two years, or three years. *See* Cal. Penal Code §§ 489(b), 18.[3]

The Information also alleged that Mr. Ewing had suffered four prior felony convictions for purposes of an enhanced sentence under California's "Three Strikes, and You're Out" law. Cal. Penal Code §§ 667(b)-(i) (West 1999) and 1170.12(a)-(d) (West Supp. 2002).[4] That law applies when a defendant is convicted of any felony, and it is pleaded and proved that he was previously convicted of two or more enumerated "serious" or "violent" felonies ("strikes"). In those circumstances, the mandatory sentence for the current felony is life imprisonment with no possibility of parole before completion of a minimum term of twenty-five years. Cal. Penal Code § 667(e)(2). Prison conduct credits may not be applied to reduce that minimum. *In re Cervera*, 24 Cal.4th 1073, 1080 (2001). The same "enhanced" sentence applies even when the current felony is not one of the "serious" or "violent" offenses that qualify as strikes, and even when the current offense is a wobbler charged as a felony.

The trial court found the allegations of Mr. Ewing's 1994 felony convictions true and further found that the convictions qualified as strikes under the Three Strikes law. RT 1203.

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[3] Whether sentenced to sixteen months, two years or three years, a defendant can earn up to half off his or her sentence by good behavior in prison, along with participation in work, training, or education programs. Cal. Penal Code §§ 2930-2933 (West 1999).

[4] California's Three Strikes law is codified in two nearly identical statutes. The first, California Penal Code section 667, was enacted by the Legislature. The second, California Penal Code section 1170.12, was approved by California voters through the ballot initiative process. *See generally, People v. Superior Court (Romero)*, 13 Cal.4th 497, 504 (1996). As concerns this case, the two statutes contain no substantive differences. Further citations to the Three Strikes law will be to Section 667.

Mr. Ewing's prior strikes were three burglary convictions and a single robbery conviction that was related to one of the burglaries. The underlying conduct for these prior convictions all occurred within a single month in 1993 and was the subject of a single criminal proceeding, Los Angeles County Superior Court Case Number NA018343. JA 9-11. Two of the burglaries were non-violent, but qualified as "serious" crimes under the Three Strikes law. In the third burglary (also charged as a robbery), Mr. Ewing brandished, but did not use, a knife. *Id.* Mr. Ewing was sentenced to a single term of imprisonment of nine years, eight months for these offenses, and was released on parole after approximately five and a half years. JA 6; CT 87.[5]

In the instant proceeding, Mr. Ewing asked the trial court to sentence the conviction for theft of three golf clubs as a misdemeanor, as the court was entitled to do pursuant to Penal Code section 17(b). He also moved, in the alternative, to strike his prior convictions pursuant to Penal Code section 1385, which authorizes a trial court to strike prior felony conviction allegations in certain circumstances. CT 92; JA 9; Cal. Penal Code § 1385(a) (West 2000); *Romero*, 13 Cal.4th at 529-30.[6] Finally, Mr. Ewing, who was 38 at the time of

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[5] The nine-year, eight-month prison term for all the offenses was the maximum available under the law, and was composed of a sentence of six years for the robbery conviction; one year, four months each for two of the burglary convictions; and a one-year enhancement for brandishing a knife.

The sentence on the third burglary conviction, which involved the same victim as the robbery conviction, was stayed based on California's statutory prohibition against multiple punishment. *See* Penal Code § 654(a) ("[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment"). CT 87.

[6] A sentencing court may strike a prior felony allegation only if,

> in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars

sentencing, asked the trial court to take into account his health condition as a mitigating factor—he has AIDS and has already become blind in one eye as a result of the disease. JA 11.

The trial court denied Mr. Ewing's motions. Although alluding to the possibility that Mr. Ewing's criminal activity was the product of his drug problem, the court nevertheless found that he fell within the spirit and intent of the Three Strikes law: "I do have to consider threats to the community and although there isn't a real pattern of violent crimes that you pose a threat, you are clearly posing a threat for theft offenses." JA 14. The court then imposed the mandatory sentence of life imprisonment without possibility of parole for at least twenty-five years. JA 14.

Mr. Ewing appealed his conviction and sentence to the California Court of Appeal. CT 94. He argued, *inter alia*, that his sentence was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution because it is grossly disproportionate to his offense of shoplifting three golf clubs. In an unpublished opinion, the Court of Appeal affirmed the conviction and life sentence, concluding that Mr. Ewing's sentence was not cruel and unusual. Pet. App. 1 at 7.

SUMMARY OF THE ARGUMENT

A state may not sentence an individual to a punishment that is grossly disproportionate to the crime he or she has committed. Such a sentence violates the Eighth Amendment's

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of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.

People v. Williams, 17 Cal.4th 148, 161 (1998).

prohibition against cruel and unusual punishments. *Solem v. Helm*, 463 U.S. 277, 302 (1983); *Harmelin v Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring and dissenting); *see Weems v. United States*, 217 U.S. 349, 377 (1910).

To determine whether a particular sentence is grossly disproportionate, a court first evaluates "the gravity of the offense and the harshness of the penalty." *Helm*, 463 U.S. at 291-92. If that evaluation "leads to an inference of gross disproportionality," then the court may compare the sentence against other sentences imposed within the state, and against sentences imposed in other jurisdictions for the same offense to determine whether such comparisons confirm the inference. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). When evaluated under these criteria, Mr. Ewing's sentence is grossly disproportionate to his crime and must be vacated.

His offense—taking three golf clubs from a pro shop without paying for them—is not a violent crime. Standing alone, it would not even count as a prior "strike," because it is not considered by California as "serious" for purposes of its Three Strikes law. It is not even a felony in every case, but rather, is a "wobbler," a crime that can be punished, in the discretion of the prosecutor or the sentencing judge, as either a misdemeanor or a felony. Absent application of the Three Strikes law, the maximum sentence authorized by California for this theft when treated as a felony is two years, unless aggravating circumstances exist (in which case the maximum sentence is three years), with parole eligibility after serving one-half the sentence. California has determined that in the spectrum of criminal conduct, petitioner's offense is unquestionably among the least significant.

By contrast, Mr. Ewing's actual sentence of life, with a minimum of twenty-five years regardless of his good conduct in prison, is one of the most severe that California courts are

authorized to impose. Only two sentences—death, and life without parole—are more harsh, and those sentences are reserved for those who commit the most violent and reprehensible crimes.

The only justification advanced for the severity of petitioner's sentence is his status as a repeat offender. It is well established that a state may punish a recidivist more harshly than a first offender. *Rummel v. Estelle*, 445 U.S. 263, 268 (1980). Nevertheless, recidivism alone does not justify any and all sentences—even repeat offenders retain Eighth Amendment protection against cruel and unusual punishments. *Helm*, 463 U.S. at 296-300 (life sentence unconstitutional for defendant who issued a no-account check, notwithstanding his six prior felony convictions, including three for burglary).

A state that has previously punished a defendant for certain crimes may not punish him again for those same crimes. *Brown v. Ohio*, 432 U.S. 161, 169-70 (1977). Accordingly, even where, as here, recidivism is the state's sole rationale for an exceptionally harsh punishment, the focus of the Eighth Amendment inquiry is on whether the sentence is grossly disproportionate to the current crime. *Helm*, 463 U.S. at 296 n.21.

Here, as in *Helm*, petitioner's sentence far exceeds any reasonable recidivism enhancement of the penalty for grand theft. The minimum term that Mr. Ewing must serve without consideration for parole—twenty-five years—is twenty-five times longer than the one-year maximum sentence he could have received had the shoplifting crime been his first offense and treated as a misdemeanor. It is nineteen times longer than the sixteen-month sentence he would have received for felony grand theft as a first-time offender. Indeed, even if he were to receive the maximum three-year sentence because of his prior record, his minimum term under the Three Strikes

law is sixteen and two-thirds times longer than the time he likely would actually serve on the three-year sentence.

Mr. Ewing's sentence was enhanced because of his prior record, his "strikes." However, the twenty-five-year minimum sentence he received is more than two-and-one-half times greater than the nine-year, eight-month sentence he had previously received for the strike crimes themselves (a sentence reducible by one-half through good time credits).

Petitioner's sentence is more disproportionate than that upheld in *Rummel*. In *Rummel*, the defendant faced a sentence of up to ten years for his current offense of obtaining money by false pretenses, which the recidivist law increased to life imprisonment with possibility of parole after ten to twelve years. Thus, Rummel's sentence was enhanced for recidivism from a maximum of ten years to a minimum of ten to twelve. By contrast, because of his prior record, Mr. Ewing's sentence was increased from a maximum of three years to a minimum of twenty-five years.[7]

The Three Strikes law imposes a punishment enhancement based on recidivism that is disproportionate to enhancements California proscribes for other, equally or more serious, aggravating factors. For example, a defendant who is armed with a firearm or who uses a deadly or dangerous weapon while committing a crime merits a sentencing enhancement of one year under California law, and would receive an enhancement of three years if he personally inflicted great bodily

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[7] Moreover, the Texas habitual offender law did not apply unless the defendant not only had been convicted twice but also had served two prior terms of imprisonment. By contrast, the California Three Strikes law requires no prior term of imprisonment, and Mr. Ewing had been imprisoned on only one prior occasion.

injury on a victim. This is a far cry from the escalation to a twenty-five-year minimum sentence that the Three Strikes law imposes based on recidivism.

The extraordinary increase in minimum incarceration time for "third strikers" also greatly exceeds the enhanced sentencing that California elsewhere provides for recidivism. California generally limits such enhancements to an additional sentence of one to five years, or, at the most, to twice the sentence for the current crime, thus preserving some rough proportionality between the current crime and the sentence, enhanced for recidivism. By contrast, the Three Strikes law automatically fixes an extraordinarily harsh sentence of at least twenty-five years on all defendants with two strikes who commit a third felony. A twenty-five-year minimum, "one size fits all" sentence is grossly disproportionate as an enhancement for recidivism.

A threshold examination of the harshness of Mr. Ewing's sentence for relatively minor criminal conduct thus raises a strong inference that the sentence is grossly disproportionate to the crime. That inference is amply validated by consideration of other aspects of California's sentencing scheme. As in *Helm* and *Weems*, petitioner's minimum sentence is substantially more severe than the minimum terms without parole that California has authorized for numerous crimes that objectively are far more serious than petitioner's. For example, California imposes a minimum term of seven years before parole eligibility for many violent crimes, including torture, kidnapping for ransom, and attempted murder, including by detonation of an explosive device with intent to kill. *See* Cal. Penal Code §§ 3046(a), 12308 (West 1999). Thus, a first-time offender who blew up the pro shop in an effort to kill the pro shop clerk or who kidnapped the clerk to rob him would be eligible for parole in California nearly two decades before Mr. Ewing.

A finding of gross disproportionality is further confirmed by consideration of the sentence that Mr. Ewing would have received had he committed the same crime with the same prior record in a different state. As in *Helm*, it is clear that petitioner would not have received such a severe sentence in hardly any other state. In forty-three states, the District of Columbia, the federal courts, and the military courts, Mr. Ewing could not have received a life sentence at all. Indeed, in thirty-three of these states, the *maximum* sentence he could have received was ten years—forty percent of his *minimum* sentence under California law. At the time Mr. Ewing was sentenced, only one state—Louisiana—might have mandated a harsher sentence than California, life without possibility of parole. Louisiana has since amended its law so that Mr. Ewing would now face a sentence of only six-and-two-thirds to twenty years. Only five states would have even authorized a court to consider, in its discretion, whether to impose a life sentence, and if sentenced to life in those states, Mr. Ewing would be eligible for parole far sooner than in California. A comparison with other states thus further reinforces the finding that petitioner's sentence is grossly disproportionate to his crime.

Thus, in light of this Court's analysis in *Helm* and *Harmelin*, Mr. Ewing's sentence for shoplifting three golf clubs constitutes cruel and unusual punishment in violation of the Eighth Amendment.

ARGUMENT

The Eighth Amendment's prohibition against cruel and unusual punishments, which applies to the states through the Due Process Clause of the Fourteenth Amendment,[8] bars states from imposing sentences that are grossly disproportionate to the underlying crime. *Helm*, 463 U.S. at 290; *see*

[8] *Robinson v. California*, 370 U.S. 660, 667 (1962).

also Atkins v. Virginia, No. 00-8452, 536 U.S. ___ , slip op. at 5 (June 20, 2002); *Rummel*, 445 U.S. at 274 n.11; *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opn.); *Trop v. Dulles*, 356 U.S. 86, 101-02 (1958) (plurality opn.); *Weems*, 217 U.S. at 371. In *Helm*, this Court invalidated a life sentence for the crime of uttering a check against a non-existent bank account, finding the sentence to be disproportionate to the crime, notwithstanding the defendant's six prior felony convictions (including three burglary convictions) and the state's admittedly legitimate interest in enhancing punishment for habitual offenders. 463 U.S. at 303. In *Harmelin*, seven members of this Court confirmed both that a grossly disproportionate term of imprisonment violates the Eighth Amendment, and that the objective factors considered in *Helm* remain relevant to the evaluation of proportionality. 501 U.S. at 1001 (Kennedy, J., concurring); *id.* at 1009 (White, J., dissenting); *id.* at 1027-1028 (Marshall, J., dissenting). As this Court recently explained, "[t]he Eighth Amendment succinctly prohibits 'excessive' sanctions." *Atkins*, No. 00-8452, 536 U.S. ___, slip op. at 5.

This Court has established a three-step analysis for determining whether a sentence violates the Eighth Amendment. First, the gravity of the offense must be compared to the harshness of the penalty. *Helm*, 463 U.S. at 290-91. Second, the sentence imposed must be compared to the sentences authorized for other offenses in the same jurisdiction. *Id.* at 291. Third, the sentence imposed must be compared to the sentences imposed for the same offense in other jurisdictions. *Id.*; *see also Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

The first step in the analysis is a threshold test. *Id.* If a comparison of the gravity of the offense and the harshness of the penalty raises an inference of gross disproportionality, the analysis then proceeds to the second and third steps. Eighth Amendment review of a sentence "should be informed by

'objective factors to the maximum possible extent.'" *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring) (quoting *Rummel*, 445 U.S. at 274-275 (internal quotation omitted));[9] *see also Helm*, 463 U.S. at 290. Substantial deference must be accorded to the legislature's determination that a sentence is appropriate for the offense. *See Harmelin*, 501 U.S. at 998-99 (Kennedy, J., concurring). Nonetheless, "courts are competent to judge the gravity of an offense, at least on a relative scale." *Helm*, 463 U.S. at 292.

I. THE CALIFORNIA "THREE STRIKES, AND YOU'RE OUT" LAW

Under the California law, defendants with prior qualifying convictions or "strikes" receive longer sentences of imprisonment upon a subsequent felony conviction. Only "serious" or "violent" felonies, as defined in California Penal Code sections 1192.7(c) and 667.5(c), respectively, qualify as prior strikes. Cal. Penal Code § 667(d)(1). The "triggering" (*i.e.*, current) offense, however, may be any felony under California law, *Cervera*, 24 Cal.4th at 1075, including a wobbler, an offense alternatively punishable as a misdemeanor or a felony, at the discretion of the prosecutor or the court. *People v. Terry*, 47 Cal.App.4th 329, 332 (1996).[10]

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[9] Although *Harmelin* is this Court's most recent case addressing the application of the Eighth Amendment to prison terms, it did not result in a majority opinion; Justice Kennedy's concurring opinion provided the narrowest basis for the decision. As a result, lower courts have generally adopted and applied Justice Kennedy's analysis of the Cruel and Unusual Punishments Clause as the "Rule of Harmelin." *See Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001); *United States v. Jones*, 213 F.3d 1253, 1261 (10th Cir. 2000); *United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998); *but see United States v. Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995) (applying *Helm*); *Henry v. Page*, 223 F.3d 477, 481-482 (7th Cir. 2000) (same).

[10] California Penal Code section 17 was amended in 1874 to establish wobblers. Cal. Code Amends. 1873-1874, ch. 196, § 1, p. 455. In

Under the "second strike" provision of the law, a defendant with one prior strike who is convicted of any felony receives a sentence twice as long as the sentence he or she would otherwise have received. Cal. Penal Code § 667(e)(1). A determinate sentence for a "two striker" can be reduced by as much as twenty percent through good time credits. Cal. Penal Code § 667(c)(5).

When a defendant convicted of any felony has two or more prior strikes, the "third-strike" provision requires a sentence of at least twenty-five years to life (*i.e.*, an indeterminate life sentence with no eligibility for parole for at least the first twenty-five years). Cal. Penal Code § 667(e)(2)(A)(ii). The actual minimum term is the greater of (a) the term otherwise provided for the current offense with enhancements, (b) triple the term otherwise provided for the current offense without enhancements, or (c) twenty-five years. *Id.* § 667(e)(2)(A). Unlike other defendants, a three-striker is not eligible to reduce his minimum term by good-time or work-time credits while in prison. *Cervera*, 24 Cal.4th at 1080.

As noted, while the first and second strikes must be "serious" or "violent" felonies, there is no such requirement for the current conviction. The third conviction may be any felony at all, and can even be a wobbler.[11] In these

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exercising its discretion under that section, the sentencing court is to consider the nature and circumstance of the offense, the defendant's appreciation of and attitude toward the offense, his traits of character, and, when appropriate, general objectives of sentencing. *People v. Superior Court (Alvarez)*, 14 Cal.4th 968, 978 (1997). The California Supreme Court has made clear that "the fact that a crime punishable as a felony or a misdemeanor is regarded as a felony unless and until the trial court imposes a misdemeanor sentence does not show that the Legislature prefers a felony sentence to be imposed by the trial court." *In re Anderson*, 69 Cal.2d 613, 626-27 (1968).

[11] The following wobblers can be felonies under California law: issuing checks greater than $200 with insufficient funds (Cal. Penal Code § 467a); theft of domestic fowl, avocados, olives, citrus or deciduous

circumstances, the "Three Strikes" law is a misnomer; it is really "Two Strikes and a Foul Ball, and You're Out." In addition, several other features of California's Three Strikes law combine to make it particularly severe:

1. A defendant may be considered to have two prior strikes even though he was convicted of both qualifying offenses in a single judicial proceeding. *People v. Askey*, 49 Cal.App.4th 381, 386 (1996);

2. A prior conviction qualifies as a strike even if the sentence for that conviction was stayed under California Penal Code section 654(a), the statutory ban on multiple punishments. *People v. Benson*, 18 Cal.4th 24, 30 (1998);

3. To qualify as a three-striker, the defendant need not have served any prior term of imprisonment. Cal. Penal Code § 667(d)(1)(A) & (B); *compare Rummel*, 445 U.S. at 278 (Texas habitual offender law applies only if the defendant is convicted of a felony and actually sentenced to prison, then convicted of another felony and actually sentenced to prison, and then convicted of a third felony);

4. Prior strikes need not be violent offenses as long as they qualify as "serious" (*e.g.*, a residential burglary where the burglar was unarmed and residents were not home would be considered a prior strike). Cal. Penal Code §§ 1192.7(c)(18), 460(a);

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fruits, vegetables, nuts, or artichokes worth more than $100 (§ 487(b)(1)(A)); sale of five or more multichannel video descramblers (§ 593d(d)(2)(A)); vandalism of a cemetery or mortuary property (§ 594.35); recidivist affixing of graffiti (§ 594.7); dogfighting (§ 597.5); eavesdropping on a confidential communication (§ 632); disclosure of a telegraphic or telephone communication without the addressee's consent (§ 637); failure to appear on a felony charge (§§ 1320, 1320.5).

5. "Serious" or "violent" felony convictions incurred prior to the law's enactment in 1994 may be charged as strikes, *People v. Kinsey*, 40 Cal.App.4th 1621, 1631 (1995), as may a defendant's equivalent convictions in another jurisdiction, California Penal Code section 667(d)(2), and certain juvenile convictions, California Penal Code section 667(d)(3);

6. There is no "washout" period after which prior qualifying convictions will no longer be counted as strikes. *People v. Martinez*, 71 Cal.App.4th 1502, 1514 & n.9 (1999) (citing Cal. Penal Code § 1170.12(a)(3)); and,

7. Defendants with prior strikes who are convicted of current multiple felonies committed on different occasions must serve consecutive sentences. Cal. Penal Code § 667(c)(6).

As of March 31, 2002, 31,651 defendants were serving sentences that had been doubled for "second strike" offenses, and 7,167 defendants were serving "third strike" sentences of at least twenty-five years to life. Cal. Dep't of Corrections, *Second and Third Strikers in the Institutional Population* (March 31, 2002), *at* http://www.cdc.state.ca.us/pdf/strike0302.pdf. Although 3,193 three-strikers were sentenced for crimes against persons, 2,158 were sentenced to twenty-five years to life for property crimes, including grand theft (108), petty theft with a prior (344), vehicle theft (217), receiving stolen property (164), forgery (58), and second degree burglary (455), *id.*, all of which are wobblers.[12]

[12] *See* Cal. Penal Code § 489 (grand theft); *id.* § 666 (petty theft with a prior); Cal. Vehicle Code § 10851 (auto theft); Cal. Penal Code § 496 (receiving stolen property); *id.* § 473 (forgery); *id.* § 461 (second degree burglary).

II. A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR TWENTY-FIVE YEARS FOR SHOPLIFTING THREE GOLF CLUBS RAISES AN INFERENCE OF GROSS DISPROPORTIONALITY

1. An inference of gross disproportionality arises in circumstances where both the "gravity" of the offense is slight and the "harshness of the penalty" is severe. *Helm*, 463 U.S. at 291-292; *see also Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Each of these factors is plainly present here. Mr. Ewing's offense is not a serious crime. His punishment, in contrast, is one of the most severe the state can impose. His sentence thus raises an inference of gross disproportionality.

A. The Gravity of the Offense

Mr. Ewing shoplifted three golf clubs and was caught immediately. This conduct was criminal in nature, to be sure, and warrants criminal sanctions. But, by any measure, his offense falls among the least serious of crimes. Mr. Ewing's offense was not a violent one. He did not use or threaten force against any person. His was solely a property crime that did not create the risk of, or result in, bodily injury to any person. *See Helm*, 463 U.S. at 292-93 ("nonviolent crimes are less serious than crimes marked by violence or the threat of violence").

The value of the three golf clubs, although sufficient to result in a grand theft charge, was relatively small. Under an objective standard, shoplifting three golf clubs is substantially less serious than the stealing of large amounts of money or defrauding someone of their valuable property. *See Helm*, 463 U.S. at 293, 296 (noting that the "absolute magnitude" of an offense is an objective consideration relevant to determining its gravity).

Nor did Mr. Ewing's shoplifting offense threaten ongoing social harm or provide fuel for significant additional criminal activity, as do crimes involving distribution of controlled substances. Such offenses are serious because of the "momentous" threat that drug distribution and use poses to both the individual and society. *See Harmelin*, 501 U.S. at 1003 (Kennedy, J., concurring). Although shoplifting may be an on-going concern for proprietors, the monetary losses that result do not create the same irreparable harm to our society that attends drug distribution offenses.

The California Legislature itself has plainly expressed its judgment that Mr. Ewing's theft offense is among the least serious in the state. Under the California Penal Code, Mr. Ewing's offense—grand theft—need not be treated as a felony; it is a "wobbler," treatable either as a misdemeanor or a felony. Cal. Penal Code § 489(b); *Douglas*, 79 Cal.App.4th at 813. Thus, the Legislature has decided that grand theft is not, in itself, among the group of criminal offenses that are sufficiently serious to warrant felony treatment in all instances.[13]

California's Three Strikes law expressly enumerates the subset of felonies that the state considers "serious" or

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[13] The record in this case also reflects the fact that the reason Mr. Ewing's offense was treated as a felony was because of his prior criminal record. *See* Pet. App. 1 at 4-5; JA 14. In this fashion, Mr. Ewing's past conduct was used twice against him. First, it was used to justify treating his wobbler offense, otherwise a misdemeanor, as a felony. Second, it was used to increase his punishment from a maximum sentence of three years (with possibility of parole after eighteen months) to a Three Strikes sentence of life imprisonment without possibility of parole for at least twenty-five years. The use of a single aggravating factor, recidivism, to justify a life sentence for what would otherwise be misdemeanor conduct, by itself, raises an inference of gross disproportionality. *Cf. Riggs v. California*, 525 U.S. 1114, 119 S. Ct. 890, 891-92 (1999) (Stevens, J., respecting denial of certiorari) (noting constitutional question raised "when the State 'double counts' the defendant's recidivism").

"violent" enough to count as "strikes." *See* Cal. Penal Code §§ 667, 667.5, 1192.7. As could be expected, the list includes the most serious of crimes, such as murder, attempted murder, kidnapping, and assault with a deadly weapon. Cal. Penal Code §§ 667.5(c)(1), (12), (14), 1192.7(c)(1), (9), (20), (31). Also on the list are crimes such as robbery and residential burglary. Cal. Penal Code §§ 667.5(c)(9), 1192.7(c)(18), (19). Conspicuously absent from the list, however, is grand theft.

Moreover, recognizing grand theft's modest placement on the spectrum of crimes, the state has established a low sentencing range for the offense (absent application of the Three Strikes law). Misdemeanor grand theft may be punished by no more than one year in county jail and a $1,000 fine. Cal. Penal Code §§ 489(b), 672. Felony grand theft may be punished by placement on probation, or by sixteen months, two years, or three years imprisonment. When the sentencing court elects imprisonment, the two-year sentence is designated the norm, and three years may be imposed only if aggravating circumstances are present. Cal. Penal Code §§ 18, 489(b), 672, 1170(b); Cal. Rule Court 420(a) (West 1999) (renumbered 2001).

B. The Harshness of the Penalty

Mr. Ewing has received one of the state's most severe punishments for committing an offense that the state has recognized as among the least serious. He will serve at least twenty-five years in prison because, no matter how exemplary his conduct in prison, "good time" credits may not be used to reduce his minimum term below twenty-five years, *see Cervera*, 24 Cal.4th at 1080, and he may be required to remain in prison for the rest of his life—for shoplifting.

Not only is Mr. Ewing's twenty-five-year minimum term exceptionally long—more than twice as long as the term

imposed on the defendant in *Rummel*[14]—his prospects for release thereafter are uncertain. Assuming Mr. Ewing lives to complete his minimum term of twenty-five years, to obtain parole he would need to negotiate the parole procedures of the California Board of Prison Terms. *See* Cal. Penal Code § 3041(a) (West 2000), Cal. Code Regs. tit. 15, §§ 2269, 2269.1, 2281, 2410 (2001). If the Board of Prison Terms, in its unreviewable discretion, concludes that Mr. Ewing's criminal history, social history, behavior before and after the crime, attitude toward his crime, or behavior in prison render him unsuitable for parole, Mr. Ewing can spend the rest of his life in prison. *See* Cal. Code Regs. tit. 15, § 2281.[15] By any objective standard, then, Mr. Ewing's sentence of life imprisonment with no possibility of parole for at least twenty-five years is extraordinarily severe.

Mr. Ewing's sentence is indeed far more severe than the sentence upheld in *Rummel*. In that case, the maximum sentence Texas provided for the defendant's current offense of obtaining money by false pretenses was ten years. Under the state's recidivist law, his sentence was increased to life imprisonment with the possibility of parole after ten to twelve years. The recidivism enhancement effectively turned a ten-year maximum sentence into a ten-year minimum sentence. California's Three Strike law, by contrast, turned Mr. Ewing's three-year maximum sentence into a twenty-five year minimum sentence.

In sum, it is abundantly clear, both from the inherently non-violent nature and small scale of Mr. Ewing's property

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[14] "Rummel could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years." *Helm*, 463 U.S. at 302.

[15] Even if the Board grants parole, the state constitution authorizes the governor to modify or reverse the Board's decision. Cal. Const. art. V, § 8.

crime, and from California's own statutory treatment of that crime, that Mr. Ewing's offense is at the least serious end of the spectrum. By contrast, his sentence lies at the most serious end of the spectrum, a place reserved in California for only those who commit the most violent and reprehensible crimes, such as first degree murder. *See* Cal. Penal Code §§ 190(a), 190.2 (West 2000). A comparison of the crime and the sentence thus raises an inference of gross disproportionality.

2. The remaining threshold consideration is whether the state's interest in enhancing punishment for habitual offenders can rebut the inference of gross disproportionality. The state's only justification for the extraordinary severity of Mr. Ewing's sentence is his recidivism. Mr. Ewing had suffered four prior convictions that qualified as "strikes" under the California law: three burglaries, two of which were non-violent, and a third where he brandished a knife and was also charged with a robbery. All four offenses were prosecuted in the same proceeding, and he received a single sentence of imprisonment.[16] 445 U.S. at 278.

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[16] In *Rummel*, by contrast, the defendant had been sentenced to separate prison terms for his prior convictions, as this Court emphasized in upholding Rummel's sentence:

> [U]nder Art. 63, a three-time felon receives a mandatory life sentence, with possibility of parole, only if commission and conviction of each succeeding felony followed conviction for the preceding one, and only if each prior conviction was followed by actual imprisonment. Given this necessary sequence, a recidivist must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released. One in Rummel's position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail.

445 U.S. at 278.

This Court has long recognized that a state "is justified in punishing a recidivist more severely than it punishes a first offender." *Helm*, 463 U.S. at 296; *accord Rummel*, 445 U.S. at 276. This is because "repetition of criminal conduct aggravates [the offenders'] guilt and justifies heavier penalties when they are again convicted." *Graham v. West Virginia*, 224 U.S. 616, 623 (1912); *see also Witte v. United States*, 515 U.S. 389, 399 (1995) ("In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as a 'stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one,'" *quoting Gryger v. Burke*, 334 U.S. 728, 732 (1948)). As a result, the State of California may, consistent with the Eighth Amendment, view Mr. Ewing's recidivism as an aggravating factor, and may impose a more severe sentence on him than on a first-time offender.

Recidivism does not, however, provide the state with a blank check to add any enhancement it chooses. Regardless of the defendant's prior crimes, the focus of constitutional inquiry must remain on the current, not past, criminal conduct. *Helm*, 463 U.S. at 290 ("a criminal sentence must be proportionate to the crime for which the defendant has been convicted"). In *Helm*, notwithstanding the defendant's six prior felony convictions, including three for burglary, this Court insisted that the reviewing court "must focus on the principal felony—the felony that triggers the life sentence—since [the defendant] already has paid the penalty for each of his prior offenses." *Id.* at 296 n.21.

Thus, California may consider Mr. Ewing's prior convictions as increasing the gravity of his shoplifting offense. It may enhance his punishment to reflect the increased culpability of a recidivist. California may not, however, impose

an enhanced sentence that is grossly disproportionate to his current offense of shoplifting by a recidivist.

It is important to recognize the degree to which Mr. Ewing's sentence has been increased, because of his prior record, beyond the sentence he would otherwise have faced. A first-time offender who shoplifted three golf clubs would very likely be treated as a misdemeanant by the prosecutor or the sentencing judge, and as such would face a maximum sentence of one year in the county jail. Mr. Ewing's minimum sentence is twenty-five times greater than that maximum.

If treated as a felon and not placed on probation, Mr. Ewing's sentencing range would be sixteen months, two years, or three years in state prison. Where the statute specifies three possible prison terms, "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Cal. Penal Code § 1170(b); *see also* Cal. Rule Court 420(a) (West 1999) (renumbered 2001). A first-time offender who shoplifted three golf clubs, if sentenced as a felon, would likely receive a low-term sentence of sixteen months because of the absence of aggravating circumstances and the presence of at least one mitigating circumstance.[17] That sentence could be reduced by one-half through good-time credits, to only eight months in prison, making his Three-Strike minimum term nineteen times greater than the time he would actually serve.

Even if Mr. Ewing's prior record were taken into account and he was sentenced as a felon to the aggravated maximum term of three years, that term would also be reducible by one-

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[17] The California Rules of Court specify circumstances in aggravation (Rule 421), and circumstances in mitigation (Rule 423). None of the aggravating factors would apply to a first-time shoplifter, but the fact that "[t]he defendant has no prior record" (Rule 423(b)(1)) serves as a factor in mitigation.

half. His Three-Strikes minimum sentence is sixteen and two-thirds times greater than the time he would actually serve on that recidivist-enhanced sentence.

The enhancement for recidivism in the Three Strikes law is also disproportionate when compared to enhancements California prescribes for other, at least equally serious, aggravating factors. For example, committing a crime while armed with a firearm may be the basis for a sentencing enhancement of one year, Cal. Penal Code § 12022(a); using a deadly or dangerous weapon during a crime also warrants a one-year enhancement, Cal. Penal Code § 12022(b)(1); and personally inflicting great bodily injury in the commission of a felony merits a three-year enhancement, Cal. Penal Code § 12022.7(a). The perverse result is that California imposes a far greater sentence for grand theft with a criminal past than it does for grand theft while armed with a loaded gun, using a knife, or inflicting great bodily injury on a victim.

Furthermore, this enhancement of Mr. Ewing's sentence for shoplifting is grossly disproportionate to the sentence he received for the prior crimes that are the basis for the enhancement. For the prior strikes themselves, Mr. Ewing had previously received a sentence of nine years, eight months. This was the maximum available sentence and was reducible by one-half through good conduct and work credits. The state could not, consistent with the Double Jeopardy Clause, punish Mr. Ewing again for these prior strikes. *See, e.g., Brown*, 432 U.S. at 169-70. Under the Three Strikes law, however, the same crimes were used to enhance his sentence to life, with an absolute twenty-five-year minimum before he could even be considered for parole, regardless of his good conduct in prison. Thus, his prior serious crimes were used to impose an enhanced minimum sentence for the current non-serious crime that is more than two-and-a-half times his actual sentence for the prior serious crimes themselves.

3. These considerations illustrate a critical defect in California's Three Strikes law. The law produces a grossly disproportionate sentence in Mr. Ewing's case because it imposes a mandatory minimum term of twenty-five years on all defendants with two prior "strikes" who are convicted of a subsequent felony, regardless of the severity of that third felony. In this regard, the Three Strikes law is at odds with California's stated purpose of sentencing. *See* Penal Code § 1170(a)(1) ("The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by *terms proportionate to the seriousness of the offense* with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances") (emphasis added). The Three Strikes law, however, imposes a "one size fits all" sentence of at least twenty-five years that is unrelated to the seriousness of the current offense.

Another anomaly of the Three Strikes law is that it establishes different penalty structures, depending not only on whether the defendant commits a "strike offense" but also when that offense occurs in a particular career. Franklin E. Zimring, Gordon Hawkins & Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* 9 (2001). Consider a defendant convicted of burglary (a "serious offense" and thus a strike), robbery (a "violent offense" and thus a strike), and grand theft (neither a serious nor a violent offense). If that defendant were convicted of the robbery first, the burglary next, and then the grand theft, he would be deemed a three-striker and would be sentenced to twenty-five years to life. However, if he committed the grand theft first, and then the burglary and the robbery, he would be treated as a two-striker, and he would receive a sentence of only twice the normal sentence for his current robbery offense. In other words, the defendant whose criminal

activity was de-escalating from violent and serious offenses would receive a harsher sentence than the defendant whose crimes were becoming more serious and violent.

In sum, Mr. Ewing's penalty is grossly disproportionate even when the state's interest in punishing a recidivist more harshly is considered. Like the petitioner in *Helm*, Mr. Ewing "received the penultimate sentence for relatively minor criminal conduct." 463 U.S. at 303.

III. AN INTRAJURISDICTIONAL EVALUATION OF CALIFORNIA'S SENTENCING PROVISIONS CONFIRMS THAT MR. EWING'S SENTENCE IS GROSSLY DISPROPORTIONATE TO HIS OFFENSE

This Court has recognized that, to "validate" a finding of gross disproportionality in sentencing (*Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)), it "may be helpful to consider the sentences that could be imposed on other criminals in the same jurisdiction." *Helm*, 463 U.S. at 291. For example, in *Helm*, this Court considered the other crimes for which South Dakota imposed a life sentence for first-time offenders, and noted that such a sentence was authorized only for those who had committed the most serious, violent crimes. *Id.* at 298. The Court also noted that the Legislature had provided for substantially less harsh sentences than Helm's for many crimes that were far more serious than his. *Id.* Finally, the Court considered the state's other sentencing laws, and noted that the life sentence imposed for any three prior convictions, "regardless of the crimes," was comparable only to the enhancements for a second or third conviction for the most serious, violent crimes. *Id.* This "intrajurisdictional" analysis (*Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)) thus supported the Court's conclusion that Helm had received an unconstitutionally disproportionate sentence, because it showed that "Helm has been treated in the same

manner as, or more severely than, criminals who have committed far more serious crimes." *Helm*, 463 U.S. at 299. *See also Weems*, 217 U.S. at 380-381 (supporting its finding of gross disproportionality with "an impressive list of more serious crimes that were subject to less serious penalties").

A similar intrajurisdictional analysis here confirms the gross disproportionality of Mr. Ewing's sentence. First, just like the sentence invalidated in *Helm*, Mr. Ewing's sentence for shoplifting is comparable in severity only to the sentences that California otherwise reserves for those who have committed the most serious, violent crimes. California imposes only two sentences more severe than the sentence Mr. Ewing received: (1) death; and (2) life imprisonment without possibility of parole. *Cf. Weems*, 217 U.S. at 363-364 (noting that "there are only two degrees of punishment higher in scale than *cadena temporal*—death, and *cadena perpetua*").

To receive a sentence in California equal to or more severe than Mr. Ewing's for reasons other than recidivism, an individual would have to commit one of a handful of the most violent, socially destructive, and/or morally reprehensible crimes that had resulted in or threatened great bodily injury or death. For example, California imposes a sentence of twenty-five years to life, or greater, for: murder in the first degree (Cal. Penal Code § 190(a)); second degree murder where the defendant has served a prior prison term for murder (§ 190.05); murder in the second degree where defendant knew the victim was a peace officer engaged in the performance of his or her duties (§ 190(b)); treason (§ 37); procurement of the execution of an innocent person by willful perjury or subornation of perjury (§ 128); intentional train wrecking where death results (§ 218-219); assault by a person serving a life sentence, with a deadly weapon or by means likely to produce great bodily injury (§ 4500); kidnapping for ransom during which the victim dies, suffers bodily harm, or

was confined in a manner likely to cause death (§ 209(a)); and willfully and maliciously exploding a destructive device, which causes the death of any person (§ 12310(a)(1)).

Second, it is also the case here, as it was in *Helm* and *Weems*, that the state punishes many crimes that are far more serious than Mr. Ewing's with sentences that are far less harsh. Thus, for many extremely violent or serious crimes, California imposes a sentence of life imprisonment *with* possibility of parole and no specified minimum term, which renders the defendant eligible for parole in as few as seven years (Cal. Penal Code § 3046(a)). These crimes include: aggravated mayhem (§ 205); torture (§ 206.1); kidnapping for ransom (§ 209(a)); kidnapping to commit robbery or a sex offense (§ 209(b)); kidnapping during a carjacking (§ 209.5); train derailing or wrecking in which no person dies (§ 219); igniting an explosive or destructive device with intent to commit murder or that causes great bodily injury to any person (§§ 12308, 12310(b)); and using a weapon of mass destruction that may cause widespread, disabling illness, or injury in human beings (§ 11418(b)(1)). Thus, for example, if a person with no criminal past had entered the golf pro shop the day after Mr. Ewing did, and was later convicted of detonating a bomb with the intent to kill the clerk or of kidnapping the clerk to rob him, that person would be eligible for parole after seven years, nearly two decades before Mr. Ewing would be parole-eligible for his shoplifting offense.

Third, again as in *Helm*, the California Three Strikes law imposes penalties far more severe and disproportionate than do California's other recidivist statutes. *See Helm*, 463 U.S. at 298 (comparing Helm's life sentence to sentences that could be imposed under South Dakota's recidivist laws for more serious offenses). California's other habitual offender laws generally are based on the sentence otherwise available for the current offense, thus maintaining a degree of proportionality. Some California laws punish recidivists by

adding to the sentence a term of one to five years. *See, e.g.*, Cal. Health & Safety Code § 11370.2 (three-year enhancement for a specified drug offense with a prior specified drug conviction); Cal. Penal Code § 667(a) (five-year enhancement for any prior serious felony conviction upon conviction of a subsequent serious felony); Cal. Penal Code § 667.6(a) (five-year enhancement for conviction of a specified sex offense with a prior conviction of a specified sex offense); *see also* Cal. Penal Code § 666.7 (listing enhancements). Even under its Three Strikes law, California punishes a "second striker" (a person convicted of a felony with a prior conviction for a serious or violent felony) by doubling the sentence otherwise imposed for the new offense. Cal. Penal Code § 667(e)(1). Thus, other California recidivism provisions, while enhancing the punishment for the current offense because of the defendant's prior crimes, maintain a discernable proportional relationship between the relative gravity of the offense being punished and the sentence imposed.

California's Three Strikes law is different. Although the third offense must be a felony, the law does not take into account the fact that the third felony itself may not be serious by California standards. Unlike California's other enhancements for recidivism, the twenty-five-year mandatory term of imprisonment under the Three Strikes law operates in a manner wholly untethered to the current offense. Such a "one size fits all" sentencing provision "raises serious doubts about the proportionality of the sentence applied to the least harmful offender." *Rummel*, 445 U.S. at 301 (Powell, J., dissenting).

In sum, Mr. Ewing's life sentence for shoplifting, as aggravated by his prior convictions, is far more severe than the punishments that the state imposes for many violent and serious crimes, and is comparable only to the punishments imposed for the most extraordinarily serious crimes. In all other contexts California imposes enhancements for recid-

ivism that are related in some recognizable fashion to the underlying offense and are far less severe than the enhancement imposed here. Because Mr. Ewing "has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes," *Helm*, 463 U.S. at 299, and because the enhancement for recidivism in his case is completely out of proportion both to the crime for which he is being sentenced, and to the enhancements for recidivism that the state imposes in other contexts, an intrajurisdictional analysis vividly underscores the gross disproportionality of Mr. Ewing's life sentence.

IV. AN INTERJURISDICTIONAL EVALUATION OF MR. EWING'S SENTENCE FURTHER CONFIRMS ITS GROSS DISPROPORTIONALITY

Just as the intrajurisdictional comparison of sentences demonstrates the gross disproportionality of Mr. Ewing's sentence, an interjurisdictional comparison of "the sentences imposed for commission of the same crime in other jurisdictions" reinforces the conclusion that his California sentence is grossly disproportionate to his offense. *Helm*, 463 U.S. at 291. No other state in the Union today would subject a person in Mr. Ewing's circumstances to a sentence as harsh as a mandatory minimum sentence of twenty-five years to life.

A No Life Sentence in Forty-Six Other Jurisdictions.

To begin with, in forty-three of the states, the District of Columbia, the federal courts, and the military courts Mr. Ewing could not have received a life sentence at all. The vast majority of other jurisdictions thus impose a qualitatively less severe sentence than does California. This is true of the laws both as they stood at the time of Mr. Ewing's shoplifting

offense, and as they stand today. *See* Appendix 2.[18] In thirty-three states, Mr. Ewing's punishment would have fallen within a range of one to ten years.[19] Thus, in these thirty-three states, the *maximum* sentence he could receive would be only forty percent of his *minimum* twenty-five year sentence under the California Three Strikes law.

Mr. Ewing's sentence would have been even less if convicted under federal law. Under the United States Sentencing Commission Sentencing Guidelines, his sentencing range would have been six to twelve months, or twelve to

[18] Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming. *See* Appendix 2 (summarizing the applicable statutes for each state).

[19] Alaska (not more than five years), Arizona (four to six years), Connecticut (one to ten years), Delaware (not more than two years), District of Columbia (not more than ten years), Florida (not more than ten years), Georgia (ten years), Hawaii (twenty months), Idaho (not more than one year), Illinois (two to five years), Indiana (sixteen months), Iowa (three to five years), Kansas (nine to eleven months), Kentucky (five to ten years), Maine (less than one year), Massachusetts (not more than five years), Minnesota (not more than five years), Mississippi (not more than five years), Nebraska (not more than five years), New Jersey (not more than six months), New Mexico (18 months), New York (three to four years), North Carolina (one year to thirty months), North Dakota (not more than ten years), Ohio (six to twelve months), Oregon (not more than five years), Pennsylvania (not more than five years), Rhode Island (not more than 10 years), South Carolina (not more than five years), Tennessee (four to eight years), Utah (not more than five years), Washington (not more than five years), West Virginia (not more than sixty days), and Wyoming (not more than ten years). *See* Appendix 2.

eighteen months, depending on whether he pleaded guilty or went to trial.[20]

If Mr. Ewing had been a member of the armed services and thus subject to the Uniform Code of Military Justice, his maximum sentence for violating 10 U.S.C. § 921 (Article 121 of the U.C.M.J.) would have been five years confinement. *See* Manual for Courts-Martial, Appendix 12. There is no general recidivist provision in the Uniform Code.

Notably, there would be no significant difference in the punishment that Mr. Ewing would receive in these other jurisdictions, regardless of whether the jurisdiction had a recidivist law that would apply. In twenty-four states, the District of Columbia, and the federal courts, Mr. Ewing could not have been sentenced as a recidivist for his shoplifting offense,[21] either because (1) his current offense would not trigger application of the recidivist statute,[22] (2) the state's

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[20]If Mr. Ewing pleaded guilty in federal court to stealing federal property, in violation of 18 U.S.C. § 641, his guideline range would have been six to twelve months, determined as follows: base offense level of four, U.S.S.G. § 2B1.1(a) (2000) (amended 2001), plus two levels for loss of more than $1,000, *id.* § 2B1.1(b)(1)(C), minus two levels for acceptance of responsibility, *id.* § 3E1.1(a), for a total adjusted offense level of four, and a criminal history category of VI. Even if Mr. Ewing went to trial in federal court, thereby losing his acceptance of responsibility adjustment, his guideline range would have been twelve to eighteen months. He would not be subject to the federal three-strike law, *see* 18 U.S.C. § 3559(c) (West 2000), or to enhancement of his sentence as a career offender, *see* U.S.S.G. § 4B1.1 (2000).

[21] Delaware, District of Columbia, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Washington, West Virginia, and Wyoming. Ohio and Oregon have no general recidivist statute, and Kansas' recidivist statute does not apply to felonies committed after July 1, 1993. *See* Kan. Stat. Ann. § 21-4504(e)(3) (2001).

[22] *See* Me. Rev. Stat. Ann. tit. 17-A, § 1252(4-A) (West Supp. 2001); Minn. Stat. Ann. § 609.1095, subd. 2 (West Supp. 2002); 42 Pa. Cons.

recidivist statute requires that qualifying priors arise out of separate proceedings,[23] or both.[24] Of these twenty-four states, nineteen would permit a sentence of no greater than five years for Mr. Ewing's offense.[25]

Stat. § 9714(A)(1) (West 1998); S.C. Code Ann. § 17-25-45(A),(B),(C)(1) & (2) (Supp. 2001); Utah Code Ann. § 76-3-203(b), (c)(i) (Supp. 2001); W. Va. Code § 61-11-18(a) (Michie 2000).

[23] *See* Del. Code Ann. tit. 11, § 4214 (2001); *Buckingham v. State*, 482 A.2d 327, 330 (Del. 1984); D.C. Code Ann. § 22-104a(c)(1)(repealed June 8, 2001) (current version at D.C. Code Ann. § 22-1804a(c)(1) (2002)); Idaho Code § 19-2514 (Michie 1997), *State v. Harrington*, 133 Idaho 563, 990 P.2d 144, 146 (Idaho Ct. App. 1999); Mass. Gen. Ann. Laws ch. 279, § 25 (West 1998), *Commonwealth v. Hall*, 397 Mass. 466, 492 N.E.2d 84, 86 (1986); Neb. Rev. Stat. § 29-2221(1)(1995); N.H. Rev. Stat. Ann. § 651:6(I)(c)(1996); N.J. Stat. Ann. § 2C [illegible](a) (West Supp. 2001); N.C. Gen. Stat. § 14-7.1 (1999); R.I. Gen. Laws § 12-19-21(a) (2000).

[24] *See* 18 U.S.C. § 3559(c)(West 2000); Ill. Comp. Stat. § 5/33B-1(a), (d)(3) & (4) (West 1993); Ind. Code Ann. § 35-50-2-8(b)(1), (c)(1) (Michie 1998) (amended 2001); Md. Ann. Code art. 27, § 643B(a), (c) (Supp. 2001); Miss. Code Ann. §§ 99-19-81, 99-19-83 (2000); Va. Code Ann. § 19.2-297.1(A) (Michie 2000); Wash. Rev. Code Ann. §§ 9.94A.030(28), (32)(a)(i),(ii); 9.94A.570 (West 2001); Wyo. Stat. Ann. § 6-10-201(a)(i) & (ii) (Michie 2001).

[25] Delaware (not more than two years), Idaho (not more than one year), Illinois (two to five years), Indiana (eighteen months), Kansas (nine to eleven months), Maine (less than one year), Massachusetts (not more than five years), Minnesota (not more than five years), Mississippi (not more than five years), New Jersey (not more than six months), Nebraska (not more than five years), North Carolina (one year to thirty months), Ohio (six to twelve months), Oregon (not more than five years), Pennsylvania (not more than one year), South Carolina (not more than five years), Utah (not more than five years), Washington (not more than five years), and West Virginia (not more than sixty days). *See* Appendix 2.

In a few of the states where the recidivist provisions are inapplicable, the general sentencing provisions establish a wide sentencing range within which the judge can sentence the defendant. For example, in Virginia the range is from one to twenty years, Va. Code Ann. § 18.2-95 (Michie

Similarly, in nearly all of the states that would have permitted sentencing Mr. Ewing under a recidivist statute, he still would not have been subject to a mandatory sentence remotely approaching what he received in California. In nineteen of the twenty-five states in which Mr. Ewing's record could have triggered sentencing under a recidivist statute, a defendant with Mr. Ewing's record could not have received a life sentence at all.[26] Aside from the one-hundred year maximum sentence permitted in Montana, which provides for a minimum sentence of just five years, the maximum sentence he might have received in any of these nineteen states is twenty years.[27] Moreover, five of these states require no minimum sentence at all.[28]

B. Less Severe Sentences in the Remaining States

Of the six remaining states, two would no longer impose a sentence as severe as the life sentence that could have been imposed at the time of Mr. Ewing's shoplifting offense. Three of the remaining states would permit a court, in

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Supp. 2001), but the actual sentence for a person with Mr. Ewing's prior record would likely be from two years, one month, to five years, three months, the discretionary guideline range established by the Virginia Sentencing Commission. *See id.* § 19.2-298.01.

[26] Alaska (presumptive term of three years), Arizona (presumptive term of five years), Arkansas (three to twenty years), Colorado (four to twelve years), Connecticut (one to ten years), Florida (not more than ten years), Georgia (ten years), Hawaii (twenty months), Iowa (three to five years), Kentucky (five to ten years), Michigan (not more than fifteen years), Missouri (not more than twenty years), Montana (five to one hundred years), New Mexico (thirty months), New York (three to four years), North Dakota (not more than ten years), Tennessee (four to eight years), Texas (two to twenty years), and Wisconsin (not more than eleven years). *See* Appendix 2.

[27] Arkansas, Missouri, and Texas. *See* Appendix 2.

[28] Florida, Michigan, Missouri, North Dakota, and Wisconsin. *See* Appendix 2.

principle, to impose a life sentence. But none of these states couple that sentence with a minimum term of anywhere near twenty-five years. To the contrary, they permit parole far earlier—anywhere from a minimum of ten years to no minimum at all.

1. *Louisiana*

Under the state law that currently prevails in Louisiana, Mr. Ewing would not face a life sentence, although such a sentence would have been available under the law as it stood at the time of his offense. *See Atkins*, No. 00-8452, 536 U.S. ___, slip op. at 6 ("[a] claim that punishment is excessive is judged . . . by the standards that . . . currently prevail"); *id.* at 17 (construing and applying the Eighth Amendment in the light of "evolving standards of decency"). Under the current Louisiana habitual offender statute, a defendant must have at least three prior violent felony convictions to be eligible for a life sentence for grand theft. La. Rev. Stat. Ann. § 15:529.1(A)(1)(b)(ii) (West Supp. 2001) (as amended 2001). Because Mr. Ewing has only one prior violent felony conviction under Louisiana law, he would not be eligible today for life without parole, but would instead face a sentence of six-and-two-thirds to twenty years. *See* La. Rev. Stat. § 15:529.1(A)(1)(b)(i) & (D)(2) (West Supp. 2001).[29]

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[29] Under Louisiana's habitual offender law as it stood at the time of Mr. Ewing's shoplifting offense, courts had the authority to impose a sentence of life without the possibility of parole. *See* La. Rev. Stat. Ann. § 15:529.1(A)(1)(b)(ii) & (c)(ii) (West 2000), amended by 2001 La. Sess. Law Serv. 403 (West). Even so, Mr. Ewing's sentence would have been subject to attack as excessive under the Louisiana Constitution. A Louisiana court must depart downward from the minimum habitual offender sentence if it finds by clear and convincing evidence that the sentence is excessive in a given case. *See State v. Lindsey*, 770 So. 2d 339, 343-44 (La. 2000). Under the old habitual offender law, Louisiana courts carefully scrutinized sentences of life imprisonment when imposed for a relatively minor offense, and invalidated them where excessive. *See,*

2. *Oklahoma*

Like Louisiana, Oklahoma has recently amended its recidivist statute to provide that the current offense triggering a life sentence must be a violent felony. Under current Oklahoma law, Mr. Ewing would face a sentence of just four years, up to life. *See* Okla. Stat. Ann. tit. 21, §§ 51.1(C) & 1704.[30]

3. *Alabama*

Alabama would not require a court to sentence Mr. Ewing to life imprisonment. Instead, the court would have had the option under Alabama's habitual offender law to sentence a defendant to either life imprisonment or a term of not less than twenty years on conviction of a Class B felony. Ala. Code § 13A-5-9(c)(2) (Supp. 2001). Moreover, Mr. Ewing would be eligible for parole in as few as six years, four months, if he were to receive a twenty year sentence in Alabama, and no more than ten years if he were sentenced to life. *Id.* § 15-22-28(e). He could be paroled even earlier by a unanimous vote of the Board of Pardons and Paroles. *Ibid.*

4. *South Dakota*

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e.g., State v. Hayes, 739 So. 2d 301, 303-04 (La. Ct. App. 1999) (defendant, who stole $1,000 and was sentenced to life without parole under the habitual offender law, "is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case"); *State v. Burns*, 723 So. 2d 1013, 1019-20 (La. Ct. App. 1998) (life without possibility of parole sentence excessive for relatively minor drug crimes).

[30] At the time of his shoplifting offense, Mr. Ewing would have been subject to a sentence of not less than twenty years. Okla. Stat. Ann. tit. 21, § 51.1(B) (West Supp. 2000) (amended 2001). He would nevertheless have been eligible for parole after serving one-third of the sentence—six years, eight months. Okla. Stat. Ann. tit. 57, § 332.7(B). *See Rummel*, 445 U.S. at 280 (taking into account Texas's "relatively liberal" parole policies under which prisoner serving life sentence would become eligible for parole "in as little as 12 years").

In South Dakota, while Mr. Ewing would have been subject to a sentence of up to life imprisonment, there would be no mandatory minimum term. *See* S.D. Codified Laws § 22-7-8 (Michie 2001). Mr. Ewing would even be eligible for probation. *Id.* § 23A-27-12.

5. *Vermont*

In Vermont, Mr. Ewing could have been sentenced to up to life imprisonment under the state's recidivist statute. *See* Vt. Stat. Ann. tit. 13, § 11 (2001). A life sentence would not, however, have been mandatory, and Mr. Ewing could have received a lesser sentence of not more than ten years. *Id.* § 2501; *State v. Angelucci*, 405 A.2d 33, 42 (Vt. 1979). Moreover, even if Mr. Ewing did receive a life sentence under Vermont law, he would have been eligible for parole within six *months* after he was committed to prison. Vt. Stat. Ann. tit. 13, § 501(1) (2000)(amended 2001); *State v. Battick*, 349 A.2d 221, 222 (Vt. 1975).

6. *Nevada*

Finally, Nevada would have permitted Mr. Ewing to be sentenced to life without parole. However, as this Court explained in *Helm*, a life sentence without parole is not mandatory, but rather discretionary with the court in Nevada. *Helm*, 463 U.S. at 300 (citing Nev. Rev. Stat. § 207.010(2) (1981)). A Nevada court could alternately impose a sentence of life *with* possibility of parole, in which case Mr. Ewing would be eligible for parole after serving just ten years in prison, substantially less than half the amount of time he will have to serve in California. *See id.* at 300 n.27 (citing Nev. Rev. Stat. § 207.010(2)).[31]

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[31] The Court further noted that it had not been advised that any defendant in Nevada whose prior offenses were as minor as Helm's had received life without parole. *Id.*

To summarize, in thirty-three states, Mr. Ewing's sentence would have fallen into the range of one to ten years. In only one state in the nation—Louisiana—could Mr. Ewing have faced a harsher mandatory sentence at the time of his sentencing, life without possibility of parole, but that result was found excessive by the Louisiana courts and has been superseded by legislation. In only five other states would Mr. Ewing be subject even to a discretionary life term, and the severity of such a sentence in those states is significantly mitigated by the availability of early parole or probation.[32]

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[32] In *Atkins*, this Court also noted that the sentencing practices of other countries were relevant to the Court's Eighth Amendment analysis, even if such practices were not conclusive. No. 00-8452, 536 U.S. ___, slip. op. at 11-12 n.21; *see also Thompson v. Oklahoma*, 478 U.S. 815, 830 n.31 (1988) (plurality opn.). Here, too, the practices of other countries prove instructive. For example, under the United Kingdom's Powers of Criminal Courts (Sentencing) Act, 2000, chapter 6, section 109, an offender who twice commits a "serious offence," as defined in the statute, faces a sentence of life imprisonment. Notably, however, "[a]ll offences identified as serious offences are offences for which life imprisonment could be imposed quite apart from [the recidivist statute]." *R. v. Offen*, [2000] 1 Crim. App. R. 24, 1 W.L.R. 253. In contrast, California's Three Strikes law imposes a life sentence regardless of the punishment that would otherwise be imposed for the triggering offense. Indeed, Mr. Ewing received a sentence of twenty-five years to life for a shoplifting offense that is, at most, punishable by three years imprisonment.

Moreover, in the United Kingdom, a court may impose a life sentence only where the offender poses a "significant risk to the public." *Id.* Mr. Ewing's shoplifting offense would not even trigger the United Kingdom's recidivist scheme, nor would his prior burglary and robbery convictions count as priors under the scheme.

Finally, international courts will scrutinize the nature of the offense being punished and strike down a sentence that is grossly disproportionate to that offense. *See id.* (concluding that even though the defendant robbed a store with a toy gun, he did not pose a significant risk to the public under the recidivist statute); *R. v. Smith*, [1987] 1 S.C.R. 1045, 1072 (concluding that a mandatory sentence of seven years imprisonment for a drug offense was cruel and unusual punishment in violation of section 12 of the Australian Charter); *Sillery v. The Queen*, [1981] 180 C.L.R. 353, 361 (concluding that a mandatory life sentence imposed for highjacking was cruel and unusual punishment because, as applied to less serious highjacking offenses, it was excessive and served no valid legislative purpose).

CONCLUSION

As *Helm* demonstrates, a state may not, consistent with the Eighth Amendment, impose a severe sentence, such as life in prison with a lengthy minimum term, upon a habitual offender who commits a minor crime. Although Mr. Ewing committed a simple shoplifting offense and had been previously imprisoned for felony conduct only once, he nevertheless received a sentence substantially more severe than that in *Rummel*—life with a minimum term of twenty-five years. Under the criteria for evaluating gross disproportionality established by this Court in *Helm* and *Harmelin*, Mr. Ewing's sentence is grossly disproportionate to his crime. The judgment below should therefore be vacated, and the case remanded for further proceedings, including resentencing.

Respectfully submitted,

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APPENDICES

APPENDIX A

United States Constitution, Article VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Article XIV

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

California Penal Code § 17

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison.

(2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor.

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate

determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

California Penal Code § 18

Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years; provided, however, every offense which is prescribed by any law of the state to be a felony punishable by imprisonment in any of the state prisons or by a fine, but without an alternate sentence to the county jail, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.

California Penal Code § 489

Grand theft is punishable as follows:

(b) In all other cases, by imprisonment in a county jail not exceeding one year or in the state prison.

California Penal Code § 654

(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

(b) Notwithstanding subdivision (a), a defendant sentenced pursuant to subdivision (a) shall not be granted probation if any of the provisions that would otherwise apply to the defendant prohibits the granting of probation.

California Penal Code § 667

(a)(1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(5) This subdivision shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction

consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of subdivisions (b) to (i), inclusive:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled

and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(f)(1) Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(g) Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f).

(h) All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on June 30, 1993.

(i) If any provision of subdivisions (b) to (h), inclusive, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(j) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two_thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

California Penal Code § 667.5

(c) For purpose of this section, "violent felony" shall mean any of the following:

(1) Murder or voluntary manslaughter.

(2) Mayhem.

(3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.

(4) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(5) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(6) Lewd acts on a child under the age of 14 years as defined in Section 288.

(7) Any felony punishable by death or imprisonment in the state prison for life.

(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5, or 12022.55.

(9) Any robbery.

(10) Arson, in violation of subdivision (a) or (b) of Section 451.

(11) The offense defined in subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(12) Attempted murder.

(13) A violation of Section 12308, 12309, or 12310.

(14) Kidnapping.

(15) Assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220.

(16) Continuous sexual abuse of a child, in violation of Section 288.5.

(17) Carjacking, as defined in subdivision (a) of Section 215.

(18) A violation of Section 264.1.

(19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code.

(20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code.

(21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.

(22) Any violation of Section 12022.53.

The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

California Penal Code § 1170.12

(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one_fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a

prior felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d)(1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(e) Prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (d).

California Penal Code § 1192.7

(c) As used in this section, "serious felony" means any of the following:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by

force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) any burglary of the first degree; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code; (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) carjacking; (28) any felony offense, which would also constitute a felony violation

of Section 186.22; (29) assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220; (30) throwing acid or flammable substances, in violation of Section 244; (31) assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245; (32) assault with a deadly weapon against a public transit employee, custodial officer, or school employee, in violation of Sections 245.2, 245.3, or 245.5; (33) discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, in violation of Section 246; (34) commission of rape or penetration by a foreign object in concert with another person, in violation of Section 264.1; (35) continuous sexual abuse of a child, in violation of Section 288.5; (36) shooting from a vehicle, in violation of subdivision (c) or (d) of Section 12034; (37) intimidation of victims or witnesses, in violation of Section 136.1; (38) terrorist threats, in violation Section 422; (39) any attempt to commit a crime listed in this subdivision other than an assault; (40) any violation of Section 12022.53; and (41) any conspiracy to commit an offense described in this subdivision.

California Rule of Court 420

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are

included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

California Rule of Court 421

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

California Rule of Court 423

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or

parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.

APPENDIX B

Jurisdiction	Penalty For First Time Offender	Penalty For Recidivist Offender
Federal	6 to 12 months guidelines range, 10 year statutory maximum U.S.S.G. Ch. 5, Pt. A (2000); 18 U.S.C. § 641 (West 2000) value of the property stolen is equal to or exceeds $1,000 Class C felony 18 U.S.C. §§ 641, 3559(a)(3)	not applicable 18 U.S.C. § 3559(c) (West 2000); U.S.S.G. § 4131.1 (2000)
Alabama	2 to 20 years Ala. Code § 13A-5-6(a)(2) (Michie 2000) "theft of property which exceeds $1,000.00 in value" First degree theft Class B Felony *Id.* § 13A-8-3(a), (c)	life or any term of not less than 20 years Ala. Code § 13A-5-9(c)(2) (Supp. 2001)
Alaska	not more than 5 years Alaska Stat. § 12.55.125(e) (Michie 2001) "the value of the property . . . is $500 or more but less than $25,000" Second degree theft Class C felony *Id.* § 11.46.130(a)(1), (c)	presumptive term of 3 years Alaska Stat. § 12.55.125(e)(2) (Mitchie 2001)
Arizona	9 months to 2 years, 1 1/2 years presumptive term Ariz. Rev. Stat. § 13-701(A)(4), (C)(4) (2001) "theft of property . . . or services with a value of one thousand dollars or more but less than two thousand dollars" Class 5 felony *Id.* §13-1802(E)	4 to 6 years, 5 years presumptive Ariz. Rev. Stat. § 13-604(c) (2001)

Arkansas	3 to 10 years Ark. Code Ann. § 5-4-401(a)(4) (Michie 1997) the value of the property is less than two thousand five hundred dollars but more than five hundred dollars" Class C felony Id. § 5-36-103(b)(2)(A) (Michie Supp. 2001)	3-20 years Ark. Code Ann. § 5-4-501(a)(2)(D), (e)(1) (Michie Supp. 2001) (amended 2001); *Glick v. State*, 689 S.W.2d 559, 561 (1986)
Colorado	2 to 6 years Colo. Rev. Stat. Ann. § 18-1-105(1)(a)(V)(A) (West Supp. 2001) "the value of the thing involved is five hundred dollars or more but less than fifteen thousand dollars" Class 4 felony Id. § 18-4-401(2)(c) (West 1999)	4 to 12 years Colo. Rev. Stat. §§ 18-1-105(9)(a)(II) (West Supp. 2001); 16-13-101(1.5), (2) (West 1998); 18-1-105(9)(a)
Connecticut	1 to 5 years Conn. Gen. Stat. Ann. §53a-35a(7) (West 2001) "the value of the property ... exceeds one thousand dollars" *Id.* § 53a-124(a) Third degree larceny Class D felony *Id.* § 53a-124(c)	1 to 10 years Conn. Gen. Stat. Ann. §§ 53a-40(j); 53a-35a(6) (West 2001)
Delaware	not more than 2 years Del. Code Ann. tit. 11, § 4205 (2001) "goods . . . shoplifted are of the value of $1,000 or more" Class G felony *Id.* § 840(d) (2001)	not applicable Del. Code Ann. tit. 11, § 4214 (2001); Buckingham v. State, 482 A.2d 327, 330 (Del. 1984)

District of Columbia	not more than 10 years D.C. Code Ann. § 22-3812 (1995 Repl.) "the value of the property obtained . . . is $250 or more" First Degree Theft *Id.* § 22-3812	not applicable D.C. Code Ann. § 22-104a(c)(2) (2000 Repl.)
Florida	not more than 5 years Fla Stat. Ann. § 775.082(3)(d) (West 2000) "valued at $300 or more but less than $5,000" Third degree grand theft Third degree felony *Id.* § 812.014(c)(1)	not more than 10 years Fla. Stat. Ann. § 775.084(1)(a), (4)(a)(3) (West 2000) (amended 2000)
Georgia	County jail years Ga. Code Ann. §§ 16-8-2,16-8-12(a)(1), 17-10-3 (1999) "the property which was the subject of the theft exceeded $500.00 in value" Misdemeanor or felony *Id.* § 16-8-12(a)(1)	10 years Ga. Code Ann. § 17-10-7(a) (1997)
Hawaii	not more than 5 years Haw. Rev. Stat. Ann. §706-660 (Michie 1999) "property . . . the value of which exceeds $300" Second degree theft Class C felony *Id.* § 708-831(1)(b),(2)	20 months Haw. Rev. Stat. Ann. § 706-606.5(1)(a)(iv), (7)(a) (Michie 1999)

Idaho	not more than 1 year Idaho Code § 18-2408(3) (Michie 1997) "theft as defined in this chapter and . . . actions do not constitute grand theft [i.e., property obtained by extortion committed by instilling fear in victim]" *Id.* § 18-2407(2) (Michie Supp. 2001) Misdemeanor *Id.* § 18-2408(3)	not applicable Idaho Code § 19-2514 (Michie 1997); State v. Harrington, 133 Idaho 563, 990 P.2d 144, 146 (Idaho Ct. App. 1999)
Illinois	2 to 5 years 730 Ill. Comp. Stat. Ann. 5/5-8-1(6) (West Supp. 2002) "theft of property exceeding $300 and not exceeding $10,000 in value" Class 3 felony *Id.* 720, § 5/16-1(b)(4) (West 1993)	not applicable 720 Ill. Comp. Stat. § 5/33B-1(a) (West 1993)
Indiana	18 months Ind. Code Ann. § 35-50-2-7(a) (Michie 1998) "the fair market value of the property is at least one hundred thousand dollars" Class D felony *Id.* § 35-43-4-2(a)	not applicable Ind. Code Ann. § 35-50-2-8(b)(1), (c)(1) (Michie 1998) (amended 2001)
Iowa	not more than 5 years Iowa Code Ann. § 902.9(5) (West Supp. 2002) "property exceeding one thousand dollars but not exceeding ten thousand dollars in value" Second degree theft Class D felony *Id.* § 714.2(2) (West 1993)	3 to 5 years Iowa Code Ann. § 902.8 (West 1994)

Kansas	9 to 11 months Kan. Stat. Ann. § 21-4704(a) (2000) "theft of property the value of at least $500 but less than $25,000" Severity level 9 Nonperson felony *Id.* §21-3701(b)(2) (1995)	no general recidivist statute *See* Kan. Stat. Ann. § 21-4504(e)(3) (2001)
Kentucky	1 to 5 years Ky. Rev. Stat. Ann. § 532.060(2)(d) (Michie 1999) "the value of property is three hundred dollars or more" Id. § 514.030(2) (Michie Supp. 2001) Class D felony *Id.* § 532.060(2)(d)	5 to 10 years Ky. Rev. Stat. Ann. §§ 532.080(2), (5); § 532.060(2)(c) (Michie 1999)
Louisiana	not more than 10 years La. Rev. Stat. Ann. § 14:67.10(B)(1) (West 1997) "value of five hundred dollars or more" *Ibid.*	life without possibility of parole La. Rev. Stat. Ann. § 15:529.1(A)(1)(b)(ii) (West Supp. 2001) (amended 2001); id. §§ 14:2(4), (13)(y); 14:67.10
Maine	less than 1 year Me. Rev. Stat. Ann. tit. 17-A, § 1252(2)(D) (West Supp. 2001) "the value of the property is more than $1,000 but not more than $2,000" *Id.* § 353(5) (West 1983) Class D crime *Ibid.*	not applicable Me. Rev. Stat. Ann. Tit. 17-A, § 1252(4-A) (West Supp. 2001)

Maryland	not more than 15 years Md. Ann. Code art. 27, § 342(f)(1) (Supp. 2001) "the property . . . that was the subject of the theft has a value of $500 or greater" Felony *Ibid.*	not applicable Md. Ann. Code art. 27, § 643B (Supp. 2001)
Massachusetts	not more than 5 years Mass. Gen. Laws Ann. Ch. 266, § 30(1) (West 2000) "the value of property stolen exceeds two hundred and fifty dollars" *Ibid.*	not applicable Mass. Gen. Laws Ann. Ch. 279, § 25 (West 1998); *Commonwealth v. Hall*, 397 Mass. 466; 492 N.E.2d 84, 86 (1986)
Michigan	not more than 5 years Mich. Comp. Laws Ann. § 750.356(3)(a) (West Supp. 2001) "[t]he property stolen has a value of $1,000.00 or more but less than $20,000.00" Felony *Ibid.*	not more than 15 years Mich. Comp. Laws Ann. § 769.12(1)(b) (West 2000)
Minnesota	not more than 5 years Minn. Stat. Ann. § 609.52, subd. 3(3) (West Supp. 2002) "the value of the property . . . stolen is more than $500 but not more than $2,500" *Id.* § 609.52, subd. 3(3)(a)	not applicable Minn. Stat. Ann. § 609.1095, subd. 2 (West Supp. 2002)
Mississippi	not more than 5 years Miss. Code Ann. § 97-17-41(1)(a) (2000) "personal property of another[ ] of the value of Two Hundred Fifty Dollars or more" Grand larceny *Ibid.*	Not applicable Miss. Code Ann. § 99-19-81 (2000)

Missouri	not more than 7 years Mo. Rev. Stat. § 558.011(1)(3) (2000) "[t]he value of the property . . . appropriated is seven hundred fifty dollars or more" Class C felony *Id.* § 570.030(3)(1)	not more than 20 years Mo. Rev. Stat. § 558.016(7)(3) (2000)
Montana	not more than 10 years Mont. Code Ann. § 45-6-301(8)(b) (2001) "theft of property exceeding $1,000" *Ibid.*	5 to 100 years Mont. Code Ann. §§ 46-18-501, 46-18-502(1) (2001)
Nebraska	not more than 5 years Neb. Rev. Stat. § 28-105(1) (1995) "the value of the thing involved is five hundred dollars or more, but not over one thousand five hundred dollars" Class IV felony *Id.* § 28-518(2)	not applicable Neb. Rev. Stat. § 29-2221(1) (1995)
Nevada	1 to 5 years Nev. Rev. Stat. Ann. § 193.130(2)(c) (West 2001) "the value of the property . . . involved in the theft is $250 or more but less than $2,500 Category C felony *Id.* § 205.0835(3)	life without possibility of parole, life with the possibility of parole after 10 years, or 25 years with eligibility of parole after 10 years Nev. Rev. Stat. Ann. § 207.010(1)(b)(1), (2), (3) (West 2001)

New Hampshire	not more than 15 years N. H. Rev. Stat. Ann. § 651:2(11)(a) (1996) "value of the property . . . exceeds $1,000" Class A felony *Id.* § 637:11 (1)(a)	not applicable N.H. Rev. Stat. Ann. § 651:6(1)(c)
New Jersey	not more than 6 months N.J. Stat. Ann. §2C:43-8 (West 1995) Disorderly persons offense *Id.* § 2C:20-11(c) (West 1995) (amended 2000)	not applicable N.J. Stat. Ann. §§ 2C:44-3(a); 2C:44-4(c) (West Supp. 2001)
New Mexico	18 months N.M. Stat. Ann. § 31-18-15(A)(6) (Michie 2000) "value of the merchandise shoplifted . . . is more than two hundred fifty dollars but not more than two thousand five hundred dollars" Fourth degree felony *Id.* § 30-16-20 (Michie 1994)	30 months N.M. Stat. Ann. § 31-18-17(B) (Michie 2000) (amended 2001); *Stat v. Linam*, 600 P.2d 253, 255 (N.M. 1979)
New York	not more than 4 years N.Y. Penal Law § 70.00(2)(e) (McKinney 1998) "[t]he value of the property exceeds one thousand dollars" Id. § 155.30(1) (McKinney 1999), Grand larceny in the fourth degree Class E felony *Id.* § 155.30	3 to 4 years N.Y. Penal Law § 70.06(3)(e) (McKinney 1998)
North Carolina	1 year to 30 months N.C. Gen. Stat. §§ 15A-1340 17(c), (d); 14-72(a) (1999) "[l]arceny of goods of the value of more than $1,000" Class H felony *Id.* § 14-72(a)	not applicable N.C. Gen. Stat. § 14-7.1 (1999)

North Dakota	not more than 5 years N.D. Cent. Code § 12.1-32-01 (1997) "[t]he property . . . stolen exceeds five hundred dollars in value" Class C felony *Id.* § 12.1-23-05(2)(a)	not more than 10 years N.D. Cent. Code § 12.1-32-09(2)(c) (1997) (amended 2001)
Ohio	6 to 12 months Oh. Rev. Code Ann. § 2929.14(A)(5) (West 2001) "the value of the property . . stolen is five hundred dollars or more and is less than five thousand dollars" Fifth degree felony *Id.* § 2913.02(B)(2) (West Supp. 2001)	no general recidivist statute
Oklahoma	not more than 5 years Okla. Stat. Ann. tit.21, § 1705 (West Supp. 2002) "the property taken is of value exceeding Fifty Dollars" Grand larceny *Id.* tit. 21, § 1704 (West 1983) (amended 2001)	not less than 20 years Okla. Stat. Ann. tit. 21, § 51.1(B) (West Supp. 2000) (amended 2001)
Oregon	not more than 5 years Or. Rev. Stat. § 161.605 (2001) "[t]he total value of the property . . . is . . . $750 or more" First degree theft *Id.* § 164.055	no general recidivist statute
Pennsylvania	not more than 5 years 18 Pa. Cons. Stat. Ann. § 1104(3) (West 1998) "theft not [exceeding $2,000]" First degree misdemeanor *Id.* § 3903(B) (West Supp. 2002)	not applicable 42 Pa. Cons. Stat. Ann. § 9714(A)(1) (West 1998)

Rhode Island	not more than 10 years R.I. Gen Laws § 11-41-5(a) (2000) "the value of the property . . . exceeds five hundred dollars" *Ibid.*	not applicable R.I. Gen. Laws § 12-19-21(a) (2000)
South Carolina	not more than 5 years S.C. Code Ann. § 16-13-110(8)(2) (Supp. 2001) "the value of the shoplifted merchandise is more than one thousand dollars but less than five thousand dollars" Felony *Ibid.*	not applicable S.C. Code Ann. § 17-25-45(A),(B),(C)(1) & (2) (Supp. 2001)
South Dakota	not more than 10 years S.D. Codified Laws § 22-6-1(6) (Michie 1998) "[t]he value of the property stolen exceeds five hundred dollars" Grand theft Class 4 felony *Id.* § 22-30A-17(1)	up to life S.D. Codified Laws §§ 22-7-8 (Michie 2001)
Tennessee	2 to 4 years Tenn. Code Ann. §§ 40-35-105(b)(4), 40-35-112(a)(4) (1997) "the value of the property . . . obtained is one thousand dollars or more but less than ten thousand dollars" Class D felony *Id.* § 39-14-105(3)	4 to 8 years Tenn. Code Ann. §§ 40-35 106(a)(1), (c); 40-35-112(b)(4) (1997)

Texas	not more than 1 year Tex. Penal Code Ann. § 12.21(2) (Vernon 2002) "the value of the property stolen is $500 or more but less than $1,500" Class A misdemeanor *Id.* § 31.03(e)(3)	2 to 20 years Tex. Penal Code Ann. §§ 12.33(a), 12.35(c)(2)(A), 12.42(a)(3) (Vernon 2002)
Utah	not more than 5 years Utah Code Ann. § 76-3-203(3)(c) (1999) (amended 2000) "the value of the property . . . is or exceeds $1,000 but is less than $5,000" Third degree felony *Id.* § 76-6-412(b)(1) (1999)	not applicable Utah Code Ann. § 76-3-203.5 (Supp. 2001)
Vermont	not more than 10 years Vt. Stat. Ann. Tit. 13, § 2501 (1998) "the . . . property stolen exceeds $500.00 in value" Grand larceny *Ibid.*	up to life or not more than 10 years Vt. Stat. Ann. Tit. 13, § 11 (1998); *State v. Angelucci*, 405 A.2d 33, 42, 137 Vt. 272, 289-90 (1979)
Virginia	2 years, 1 month to 5 years, 3 months guideline range, Va. Code Ann. § 17.1-805 (Michie 2000) (level 51, Larceny) 1 to 20 years statutory range Va. Code Ann. § 18.2-95 (Michie Supp. 2001) "goods . . . of the value of $200 or more" Grand larceny *Ibid.*	not applicable Va. Code Ann. § 19.2-297.1 (Michie 2000)

Washington	1 year, 1 day to 14 months, not more than 5 years Wash. Rev. Code Ann. §§ 9A.90.021(1)(c); 9.94A.510(1) (West 2002) "[p]roperty . . . which exceeds two hundred and fifty dollars in value . . . but does not exceed one thousand five hundred dollars" Second degree theft Class C felony *Id.* § 9A.56.040(1)(a)	not applicable Wash. Rev. Code Ann. §§ 9.94A.030(28), (32)(a)(i), (ii); 9.94A570 (West 2001)
West Virginia	not more than 60 days W. Va. Code Ann. § 61-3A-3(a)(2) (Michie 2000) "the value of the merchandise exceeds five hundred dollars" Misdemeanor *Ibid.*	not applicable W. Va. Code Ann. § 61-11-18(a) (Michie 2000)
Wisconsin	not more than 5 years Wis. Stat. Ann § 939.50 (3)(e) (West Supp. 2001) "the value of the property exceeds $1,000 but not $2,500" Class E felony *Id.* § 943.20(3)(b) (West 1996)	not more than 11 years Wis. Stat. Ann. § 939.62 (1)(b), (2) (1996)
Wyoming	not more than 10 years Wyo. Stat. Ann. § 6-3-404(a)(i) (Michie 2001) "the value of the property is five hundred dollars or more" *Ibid.*	not applicable Wyo. Stat. Ann. § 6-10-201(a)(i) & (ii) (Michie 2001)